Supreme Court, U. S.
FILED
AUG 15 1980
MICHAEL RODAK, JR., CLERK

80-77

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPHINE LOPEZ, et al.,

Appellants,

v.

THE CITY OF DAYTON, et al.,

Appellees.

On Appeal From The Supreme Court of Ohio

MOTION TO DISMISS OR AFFIRM

Wendell D. Sellers,
Counsel of Record, and
William L. Havemann
PICKREL, SCHAEFFER & EBELING
2700 Winters Bank Tower
Dayton, Ohio 45423
(513) 223-1130
Attorneys for Appellees

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	page
TABLE OF AUTHORITIES	III
OPINION BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
QUESTIONS PRESENTED	3
STATEMENT	4
ARGUMENT	
I. APPELLANT'S APPEAL WAS UNTIMELY AND SHOULD BE DISMISSED	5
II. A STATE AND ITS POLITICAL SUBDIVISIONS ARE IMMUNE TO AN ACTION FOR DAMAGES ARISING OUT OF THE PERFORMANCE OF A GOVERNMENTAL FUNCTION, ABSENT CONSENT	7
III. A STATE MAY EXTEND ITS SOVEREIGN IMMUNITY TO MUNICIPALITIES AND THE EMPLOYEES THEREOF WHILE SUCH EMPLOYEES ARE RESPONDING TO AN EMERGENCY CALL WITHOUT OFFENDING THE FOURTEENTH AMENDMENT	8
CONCLUSION	9
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: page

Boylan v. *United States,* 257 U.S. 614 (1921) 5

Employees of the Dept. of Public Health and Welfare, State of Missouri v. *Dept. of Public Health and Welfare, State of Missouri,* 411 U.S. 279 (1973) 7

Hans v. *Louisiana,* 134 U.S. 1 (1890) 7

Marquette National Bank v. *First of Omaha Corporation,* 439 U.S. 299 (1978) 6

McGowan v. *Maryland,* 366 U.S. 420 (1961) 8

Palmer v. *Ohio,* 248 U.S. 32 (1918) 7

Scofield v. *N.L.R.B.,* 394 U.S. 423 (1969) 6

Constitutional Provisions:

Eleventh Amendment, United States Constitution .. 1

Fourteenth Amendment, United States Constitution . 1

Statutes:

Section 701.02, Ohio Revised Code 2, 4, 8

Rule IX, Rules of the Supreme Court of Ohio 2-3

80-77

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPHINE LOPEZ, Individually and
as Guardian of Joseph Lopez, an Incompetent,

Appellants,

v.

THE CITY OF DAYTON and
GERALD J. LUCAS,

Appellees.

On Appeal From The Supreme Court of Ohio

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the Supreme Court of Ohio is unreported but it is set forth in the Appendix on Page 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eleventh and Fourteenth Amendments to the Constitution of the United States.

This case also involves Section 701.02 of the Ohio Revised Code which provides:

> "Any municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents or servants while engaged in the operation of any vehicle upon the public highways of this state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent, or servant is engaged upon the business of the municipal corporation.
>
> The defense that the officer, agent or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:
>
> (A) Members of the police department engaged in the operation of a motor vehicle while responding to an emergency call;
>
> (B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm.
>
> Firemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function.
>
> Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call."

This case also involves Rule IX of the Rules of the Supreme Court of Ohio which provides in pertinent part:

RULE IX
MOTIONS FOR REHEARING AND ISSUANCE OF MANDATE

"Section 2. Issuance of Mandate.

Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing. No mandate shall issue on denial of a motion to certify or a motion for leave to appeal, or upon the sustaining of a motion to dismiss an appeal as one not involving a substantial constitutional question."

QUESTIONS PRESENTED

I

Whether Appellants' appeal was timely filed.

II

Whether the state and its political subdivisions are immune to an action for damages arising out of performance of a governmental function, absent consent.

III

Whether a state may extend its sovereign immunity to municipalities and employees thereof while such employees are responding to an emergency call without offending the Fourteenth Amendment.

STATEMENT

On May 10, 1978, Appellant filed a Complaint in the Common Pleas Court of Montgomery County, Ohio, alleging that her ward was injured when Appellee, Gerald J. Lucas, operated a fire engine through a red light at an intersection in Dayton, Ohio. Mr. Lucas was employed as a firefighter by Appellee, City of Dayton, at the time of the accident. It is undisputed that Lucas was on his way to a fire at a bottling plant in Dayton.

On March 30, 1979, the trial court entered summary judgment in favor of defendants due to the immunity provisions found in Section 701.02 of the Ohio Revised Code. The Second District Court of Appeals for the State of Ohio affirmed. On March 20, 1980, the Supreme Court of Ohio sua sponte dismissed Appellant's appeal to that Court "for the reason that no substantial constitutional question exists herein." See page 1a of Appendix.

Although Appellant suggests in her Statement of Facts that the final Order of the Ohio Supreme Court was entered on April 4, 1980, it is apparent from a review of the Order itself (reproduced at page 1a of the Appendix) that the Order was entered on the docket of the Supreme Court of Ohio on March 20, 1980, not April 4, 1980. A true and certified copy of the Order together with an Affidavit of the Deputy Clerk of the Supreme Court of Ohio has been filed with the office of the Clerk of the Supreme Court of the United States. The Affidavit is also reproduced in the Appendix. See page 3a.

The Order was certified to the Court of Appeals of Montgomery County, Ohio, Second Appellate District, and entered in that Court on April 4, 1980. Again, however, the final Order was docketed in the Supreme Court of Ohio on March 20, 1980.

Appellant filed a Notice of Appeal to the Supreme Court of the United States in the Common Pleas Court of Montgomery County, Ohio on June 24, 1980, that is, ninety six days after final judgment was entered in the Supreme Court of Ohio and attempted to docket the within appeal in this Court on June 26, 1980, eight days beyond the time for perfecting the appeal.

ARGUMENT

I. Appellant's appeal was untimely and should be dismissed.

As noted in the foregoing Statement of Facts, the judgment from which Appellant appeals was entered in the Supreme Court of Ohio on March 20, 1980, that is, ninety eight days before she attempted to docket her appeal in this Court.

Appellant was required to perfect her appeal within ninety days. 28 U.S.C. § 210 (c) ; Rule 11, Revised Rules of the Supreme Court of the United States.

Although it appears from the record that Appellant filed her appeal within ninety days after the intermediate court docketed the entry certified to it by the Clerk of the Ohio Supreme Court, the appeal was, nevertheless, untimely. The act of the Clerk of the Court of Appeals in docketing the entry of the Ohio Supreme Court was ministerial at best. The statutory period began to run from the entry of judgment in the Ohio Supreme Court, not the Court of Appeals. *Boylan* v. *United States,* 257 U.S. 614 (1921).

A judgment for purposes of appeal is final when the issues are "adjudged and settled with finality," that is,

when judgment is entered in the Court from which an appeal is taken. *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 427 (1969); *Marquette National Bank* v. *First of Omaha Corporation*, 439 U.S. 299, 541 (1978).

The judgment from which Appellant appeals was final when the entry was filed in the Supreme Court of Ohio on March 20, 1980. The rights of the parties were determined with finality at that time. Summary judgment had been entered against plaintiff in the trial court. On November 29, 1979, that judgment was affirmed in the Court of Appeals. See page A6 of the Appendix attached to Appellant's Jurisdictional Statement. The Court of Appeals did not remand the case to the trial court. On March 20, 1980, the Supreme Court of Ohio dismissed Appellant's appeal to the Court for want of a substantial constitutional question. Although the judgment entry filed in the Supreme Court was certified by its Clerk to the Court of Appeals for filing in that Court, no mandate issued. In fact, the Rules of the Supreme Court of Ohio provided otherwise. Ohio Supreme Court Rule IX (2) provides in pertinent part:

> ". . . No mandate shall issue . . . upon the sustaining of a motion to dismiss an appeal as one not involving a substantial constitutional question."

In short, once the entry was filed in the Ohio Supreme Court, there was nothing left to be done which could have conceivably affected the rights of the parties.

It is respectfully submitted, therefore, that Appellant's appeal was untimely and should be dismissed.

II. A state and its political subdivisions are immune to an action for damages arising out of the performance of a governmental function, absent consent.

It should be noted that Appellant does not maintain that the immunity afforded Appellees must be overlooked to protect any particular, fundamental right guaranteed her by the Constitution of the United States. Appellant does not maintain that Appellees, for example, have acted under color of law, unconstitutionally toward her. She claims only that sovereign immunity is unconstitutional because it deprives her and others similarly situated of the right to sue the state.

It is well established, however, that the right of a citizen to sue the state cannot be derived from the Constitution or laws of the United States. *Palmer* v. *Ohio,* 247 U.S. 32 (1918).

The inherent nature of sovereignty itself coupled with the Court's interpretation of the eleventh amendment precludes a suit against the state without its consent. *Employees of the Dept. of Public Health and Welfare, State of Missouri* v. *Dept. of Public Health and Welfare, State of Missouri,* 441 U.S. 279 (1973); *Hans* v. *Louisiana,* 134 U.S. 1 (1890).

Under the circumstances, the issue raised by Appellant should be dismissed for want of jurisdiction.

III. A state may extend its sovereign immunity to municipalities and the employees thereof while such employees are responding to an emergency call without offending the Fourteenth Amendment.

Even if the State of Ohio and City of Dayton could be sued without the state's consent, Appellant's claim does not invoke, as the Supreme Court of Ohio has noted, a substantial constitutional question.

Section 701.02 of the Ohio Revised Code is not by any means discriminatory. It provides that municipalities, its police officers and firemen are immune to a suit for damages arising out of their conduct during an emergency. No classification is involved. The statute treats Appellant and all others equally. *No one* may sue an Ohio municipality, its police officers or firefighters under such circumstances.

Moreover, even if a classification could be conceived, it is readily apparent from the face of the statute that it was designed to and does further a legitimate state interest. Appellant does not claim that any "fundamental" interest recognized under the Constitution or federal laws has been abridged, or that she is a member of any "suspect" class. In the absence of such considerations, the statute must be upheld if there is any conceivable set of facts under which the classification, if that is what it is, rationally furthers a legitimate legislative objective. *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

The immunity afforded municipalities in Ohio and their firefighters by Section 701.02 of the Ohio Revised Code is limited to the negligence of members of the fire department while actually engaged in the duty of fighting a fire "or while proceeding toward a place where a fire is in pro-

gress or is believed to be in progres, or in answering any other emergency alarm", that is, under circumstances where lives and property may be lost if response is not immediate.

This matter having been disposed of by motion for summary judgment in the trial court, there is no evidence of record to rebut the overwhelming state interest apparent from the face of the statute itself.

CONCLUSION

For any one of the reasons set forth above, appellees request that this Court dismiss Appellant's appeal and/or affirm the judgment entered in the Supreme Court of Ohio on March 20, 1980.

Respectfully submitted,

Wendell D. Sellers,
Counsel of Record
William L. Havemann

PICKREL, SCHAEFFER & EBELING

2700 Winters Bank Tower
Dayton, Ohio 45423
(513) 223-1130

Attorneys for Appellees

APPENDIX

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

1980 Term

To wit: March 20, 1980

No. 80-106

THE STATE OF OHIO,
City of Columbus
Josephine Lopez, etc.,

Appellant,

v.

City of Dayton, et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS for MONTGOMERY County

This cause, here on appeal as a right from the Court of Appeals for MONTGOMERY County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of Court of Appeals for MONTGOMERY County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of APR 01 1980, 19....

THOMAS L. STARTZMAN
Clerk

SAM F. ATKINS
Deputy

AFFIDAVIT OF THE DEPUTY CLERK OF THE SUPREME COURT OF OHIO

STATE OF OHIO)
) SS: AFFIDAVIT
COUNTY OF FRANKLIN)

After having been duly cautioned and sworn according to law, the undersigned deposes and says as follows:

(1) That he is an adult, that he has personal knowledge of the matters stated herein, and is competent to testify thereto;

(2) That he is the Deputy Clerk of the Supreme Court of Ohio;

(3) That the Entry hereto attached and marked Exhibit A, dismissing appeal number 80-106, and entitled *Josephine Lopez, Etc., Appellant* v. *City of Dayton, et al, Appellees,* was entered on the docket of the Supreme Court of Ohio on March 20, 1980.

/s/ SAM F. ATKINS
Sam F. Atkins
Deputy Clerk,
Supreme Court of Ohio

Sworn to before me and subscribed in my presence by the said Sam F. Atkins, this 31st day of July, 1980.

/s/ WILLIAM L. HAVEMANN, Attorney

. . . . . .

Notary Public